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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 990

W. S. DICKEY CLAY MANUFACTURING COMPANY,
Petitioner,

v.

WILLIAM H. CORDER, d b a W. H. C. TRUCKING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

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INDEX

	Page
Jurisdictional Grounds	1
Questions Presented for Review	2
Statement of the Case	3
(a) Contracts and permits under which Corder operated	3
(b) Railroad Commission's constructions	3
(c) The parties' contentions	3
(d) Statutes and Railroad Commission orders	4
Certificate of Service	11

Authorities Cited

	Page
Elder Dempster & Co. v. St. Louis Southwestern Ry., 154 S. W. 975	9
International Printing Pressmen & Assistants' Union v. Smith, 198 S. W. 2d 729	9
Kerby v. Collin County, 212 S. W. 2d 494	9
Steele v. General Mills, 329 U. S. 433	5, 8
Texas Pacific Coal & Oil Co. v. Stuard, 7 S. W. 2d 878	9
T&NO RR v. Thompson, 284 S. W. 2d 402	4

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PETITIONER'S REPLY BRIEF

W. S. Dickey Clay Manufacturing Company, petitioner herein, files the following reply to Respondent's brief in opposition to petition for writ of certiorari, not dated, received April 15, 1963.

JURISDICTIONAL GROUNDS

Respondent erred in stating that the decision conforms to long established state policy requiring that contract motor carriers charge at least the minimum rates prescribed by the Texas Railroad Commission (Page 2). The record shows that the Texas Railroad Commission has never prescribed minimum rates on clay pipe to be observed by contract motor carriers. Regular route common carrier motor carriers published a provision in their tariffs providing certain

minimum rates but they had no authority to make such publication. In Texas, the Railroad Commission of Texas has exclusive authority to initiate intrastate rates. Tariffs published by carriers have no effect unless they conform with Commission orders.

QUESTIONS PRESENTED FOR REVIEW

1. Respondent erred, page 2, in assuming that the Commission prescribed minimum rates on clay pipe for contract carriers and he cited no such order.

2. The sole consideration supporting the contract referred to by Respondent, page 3, is show in paragraph 3, page 51 of the record. Respondent now contends that consideration was illegal. The effect of failure of consideration on the enforceability of written contracts is a primary question at issue.

3. If the suit were founded on contracts in writing, the rates provided therein and subsequently paid in full would be applicable. The provision in paragraph 6, page 52 of the record was an obligation by the carrier and required it to obtain a certificate and comply with the Commission rules and regulations.

4. The finding of the lower courts, cited by Respondent on page 4, that the Commission had prescribed rates on clay pipe to be observed by contract carriers was based on tariff publication by regular route common carrier motor carriers. Respondent has cited no order prescribing such rates.

STATEMENT OF THE CASE

(a) *Contracts and Permits Under Which Corder Operated*

The new Corder contract made on or about June 1, 1954, provided for rail rates to certain destinations and higher than rail rates to other destinations (R. 321 and Plaintiff's Exhibit 15).

(b) *Railroad Commission's Construction*

Respondent erred in assuming that the statement made by its inspector reflected the Commission's construction of its orders. The Railroad Commission never approved SWMFB Tariff 25-E and it never issued any order providing that the rates named therein should be observed by contract carriers. Corder's service was not similar to the service of the regular route carriers participating in SWMFB 25-E (R. 283-286, 354). There was no trial involving the charges filed by the Rate Inspector. Corder and Dickey both paid small fines to dispose of the argument (R. 129). No one argues with a policeman.

(c) *The Parties' Contentions*

Respondent contends that the Railroad Commission of Texas has fixed rates on truckload shipments of clay pipe but he cites no order to that effect. Respondent admits, page 7, that the specialized motor carrier rates on clay pipe did not apply for contract carriers but he contends that the Rates prescribed in Circular 4028 did apply for contract carriers. That order does not so provide. See page 55,

Appendix to petition. It was issued on application of regular route common carriers and it applied only for their account.

The order referred to on pages 51-52 of the petition did not name truckload shipments of clay pipe and did not refer to it in any way.

(d) *Statutes and Railroad Commission Orders*

Respondent erred in indicating at the bottom of page 7 that specialized motor carriers are not common carriers. The Texas courts hold that specialized carriers are "common carriers". See *T&NO RR v. Thompson, 284 S. W. 2d 402, Writ of Error Refused, N.R.E.*

The only orders cited at pages 409-415 of the record, referred to on page 8 of the reply, are General Order 25, MF Circ. 2073, MF Circ. 2732 (erroneously shown as 273), and MF Circ. 3363. General Order 25 applied only to L. T. L. shipments of merchandise and has long since been obsolete (Defendant's Ex. 8). MF Circ. 2073 superseded General Order 25 and applies only to L. T. L. shipments of merchandise. MF Circ. 2732 and MF Circ. 3363 are discussed on pages 8 and 9 of our original petition. They did not affect truckload clay pipe shipments in any way. The basis for the District Court's conclusion is found in the tariffs cited on pages 412 and 413 of the record. They did not conform with the Commission's orders and have no validity under Texas statutes unless they do so conform.

Respondent states on page 9 of his reply:

> "In 1949, when the Cage contract was made with Dickey, and at all times when Corder was hauling for Dickey, there was no lawful authority at all for a contract carrier to base his charges on rail carload rates."

That is Question No. 1 here at issue. Respondent cites no authority for his position. Dickey contends that, prior to the prescription of contract carrier rates by the Railroad Commission of Texas, contract carriers may contract with shippers for any charge on which they agree. Rates are fixed by the Railroad Commission of Texas, not by statute or by carriers.

The computation by *Witness Eskelin*, referred to by Respondent on page 10 of his brief, was for the purpose of comparing charges paid with the charges accruing under RRCofT Tariff 6-D and SWMFB Tariff 25. SWMFB Tariff 25-E named the rates applicable via regular route common carriers which do not transport shipments that Dickey makes (R. 354).

(e) *Lower Courts Did Not Follow Texas Statutes*

Respondent claims, page 10, that the Railroad Commission of Texas has performed its duties and prescribed contract carrier rates on truckload shipments of clay pipe but he still does not cite any such order. In *Steele v. General Mills, 329 U. S. 433*, the Commission had prescribed rates on the merchandise there involved and that fact was admitted by all parties. Paragraph 13 of the contract involved in that case provided that the rates to be paid would be those

fixed by the Railroad Commission of Texas. In this case the Commission had not yet fixed rates to apply on clay pipe in truck loads to be observed by contract carriers and the rates contracted for between Corder and Cage are the legally applicable rates. Neither the Respondent nor the lower courts have cited any order prescribing rates on clay pipe for contract carriers. They are basing their conclusions on carrier tariffs which do not conform with orders of the Commission. The carrier has collected the lawful rates and all charges have been paid on that basis (R. 232). No collateral attack is being made on any Commission order. We attack the carrier's printed tariffs because they do not conform with the order of the Commission in MF Circ. 4028 prescribing regular route common carrier rates.

Respondent contends, page 12, that the Court of Appeals did not hold that carriers can by publication amend and revise the rates previously prescribed by the Railroad Commission of Texas but the record shows no order requiring contract carriers to observe the rates prescribed for regular route common carriers in MF Circ. 4028, page 55, Appendix to petition. The Court held that they must be observed by contract carriers because the carriers published the MF Circ. 4028 rates in a tariff providing that the rates named therein apply as minimum for contract carriers.*

Respondent further contends, page 12, that the Railroad Commission approved and adopted SWMFB Tariff 25,

*When the Railroad Commission of Texas desires to make the regular route common carrier rates applicable to contract carriers, it includes in its order a provision to that effect. See MF Circular 2732 (Plaintiff's Exhibit 30b) and page 33, Appendix to Petition. That circular, however, did not apply to clay pipe. MF Circ. 4028 contained no such provision.

SWMFB Tariff 25-A, SWMFB Tariff 25-B, etc. The only tariff approved and adopted by the Railroad Commission was Tariff 25. That action was taken after a proof copy of the tariff had been examined and found to conform with Commission orders. See MF Circ. 3363, page 51, Appendix to Petition. There were no truckload clay pipe rates in that tariff at the time Circular 3363 was issued. No truckload clay pipe rates were ever added to SWMFB Tariff 25. The first regular route common carrier truckload rates on clay pipe were prescribed in MF Circ. 4028 (Page 55), effective March 6, 1951, a year or more after SWMFB Tariff 25 had been cancelled.

Respondent contends, page 12, that SWMFB Tariff 25-A and later tariffs were published "for the purpose of incorporating changes made by the Railroad Commission orders." But the carriers did not confine the tariff changes to those made by the Commission. As to truckload shipments of clay pipe the Commission prescribed rates to be assessed by regular route common carriers only. The carriers provided in their tariffs that they should be observed as minimum by contract carriers. There was no authority in Commission orders for such a provision.

Respondent states that Dickey's contentions would permit carriers and shippers to agree on rates and charges until such time as the Commission prescribes rates on the commodity involved (page 12). That has always been true in Texas. Prior to 1891 the railroads and shippers could legally make agreements as to rates. In 1891 the Commission was given the exclusive power to initiate and prescribe all rail

rates. In 1931 the Commission was given exclusive power to initiate and prescribe contract carrier motor rates. Since that time it has prescribed contract carrier rates on a great majority of moving commodities but there are a few, including clay pipe in truckload quantities, for which it has not yet prescribed any rates. The Texas Legislature did not prescribe any rail or motor rates. It left that duty up to the Commission. Until the Commission prescribes contract carrier rates, the carrier and shipper can legally contract to observe any rates they may be able to agree on. This is in accord with the decision in *Steele v. General Mills, 329 U. S. 433.* In that case every one agreed that the Commission had acted before the contract was entered into and it provided that the Commission rates would be protected.

Respondent states, page 12, that Dickey advocated a policy which would nullify the Texas policy that the legal charges must be paid by the shipper. We agree that the legal charges must be paid but we contend that the legal charges are those provided in the contracts, since the Commission has not yet prescribed any contract carrier rates on clay pipe in truck loads.

Respondent argues, page 12, that a contract carrier could not collect any charges if the contract were held to be void because of failure of consideration. He overlooks the fact that, if the consideration clause is void because it does not provide for rates which have already been prescribed by the Commission, the contract carrier could collect the prescribed rates under the Texas statutes, just as was done in *Steele v. General Mills, 329 U. S. 433.* That is what Corder

is attempting to do here but he has failed to show that the Railroad Commission prescribed any truck load rates on clay pipe.

Respondent apparently admits, page 13, that the Texas courts hold that the failure of consideration in a written contract renders the entire contract void but he cites cases to show that the four year statute applies in connection with the collection of freight charges. None of them are in point here.

Elder Dempster & Co. v. St. Louis Southwestern Railway Company, 154 S. W. 975, involved the sole issue as to whether a bill of lading is a written contract. The supreme court held that it is a written contract and that the four year statute applies. Corder did not issue any bills of lading.

International Printing Pressmen & Assistants' Union v. Smith, 198 S. W. 2d 729, involved a suit for wrongful expulsion from a Union under its constitution and bylaws. Corder has alleged no breach of any contract.

Texas Pacific Coal & Oil Company v. Stuard, 7 S. W. 2d 878 (*writ refused*), involved the question as to whether express oral agreements, made contemporaneously with and in addition to a written lease contract, supersede implications of such contract. There were no oral, contemporaneous agreements between Corder and Dickey.

Kerby v. Collin County, 212 S. W. 2d 494, held that the minutes of the County Commissioners Court, showing the employment of Mrs. Kerby and her acceptance as County

Treasurer, was a sufficient writing to bring the matter within the four year statute, Article 5527, page 50, Appendix to petition.

We respectfully submit that a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frank A. Leffingwell, an attorney of record for petitioner, do hereby certify that I have this day served copies of the foregoing reply on attorneys for Corder by sending by first class U. S. Mail:

2 copies to Mr. James F. Gardner, Petroleum Center, B-142, 900 N. E. Military Drive, San Antonio 5, Texas.

1 copy to Mr. James P. Hart, 904 Brown Building, Austin 1, Texas.

Witness my hand at Dallas, Texas, this 18th day of April, 1963.

FRANK A. LEFFINGWELL